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IN THE SUPREME COURT

STATE OF ARIZONA

PETITION TO AMEND RULE 39,
ARIZONA RULES OF PROCEDURE
FOR THE JUVENILE COURT

Supreme Court No. R-16-0009

**Comment of the Arizona Public Defender
Association in Response to the Request
Amend Rule 39, Arizona Rules of Juvenile
Procedure**

Pursuant to Rule 28, Arizona Rules of the Supreme Court, the Arizona Public Defender Association (APDA) submits its Comment regarding the Petition to Amend Rule 39 of the Arizona Rules of Procedure for Juvenile Court filed by Judge Colleen McNally, R-16-0009. The APDA is an Arizona non-profit corporation comprised of public defense offices and programs throughout the State of Arizona. The primary purposes of our organization include improving the quality of legal representation of indigent people who face the loss of liberty or the right to parent, and ensuring a just legal system. Our offices defend the overwhelming majority of individuals who are involved in a Title 8 dependency or severance.

1 The proposed amendment to Rule 39 submitted by Judge McNally should be
2 denied. Judge McNally is requesting that Rule 39, of the Rules of Procedure for Juvenile
3 Court, the process by which counsel may withdraw from representation of clients in
4 dependency proceedings, be amended to mirror the Rules of Civil Procedure and the Rules
5 of Family Law. However, the process for retaining an attorney in dependency matters is
6 significantly different from privately hiring an attorney in a civil or family law matter.
7 Most dependency clients, whether parents or children, are indigent. Arizona Revised
8 Statute (A.R.S.) §8-824(D)(1), entitles a parent to counsel, including appointed counsel if
9 the parent is indigent. Parties in civil and family court matters are not entitled to court
10 appointed counsel. Counsel in civil and family court matters are retained by the parties.
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14 Appointment of counsel in a dependency matter is akin to appointment of counsel
15 in a criminal matter. Counsel is not selected and retained by the client, but rather assigned
16 to the client. Prior to appointment, the attorney and client have not met. On occasion, the
17 demands and expectations of the client make ethical representation of the client
18 impossible. When an attorney feels they are unable to ethically represent a client, they
19 have a duty to move to withdraw.
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21 In *Maricopa County Public Defender's Office v. Superior Court in and for County*
22 *of Maricopa*, the Arizona Court of Appeals, stated, “counsel’s avowal of an ethical conflict
23 requiring withdrawal is entitled to great weight despite the concern that some might abuse
24 this trust: ‘[A]ttorneys are officers of the court, and when they address the judge solemnly
25 upon a matter before the court, their declarations are virtually made under oath.’” 187
26 Ariz. 162, 166, 927 P.2d 822, 826 (App. 1996) (citing *Holloway v. Arkansas*, 435 U.S.
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1 475, 486-87 (1978)). The Court of Appeals further stated that a court may inquire into the
2 reason for withdraw, but the court may not require the attorney to disclose confidential
3 information in order to be relieved from representation. *Id.* at 167, 927 P.2d at 827.
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5 An attorney must request to withdraw from representation as a result of a conflict of
6 interest with a witness, current client, or former client ER 1.7 and ER 1.16, Rules of
7 Professional Conduct. Counsel also must request to withdraw when a client is insisting
8 that the attorney engage in unethical conduct ER 1.2 and 1.16(b)(3), Rules of Professional
9 Conduct. Whether the client agrees with the request to withdraw or not, the attorney
10 ethically must request to be relieved from representation.
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12 The proposed addition to Rule 39 (C)(2), requiring that the motion to withdraw be
13 served upon the client, is unnecessary. Ethical Rule 1.4, Rules of Professional Conduct,
14 requires an attorney to keep the client informed. Counsel is ethically obligated to provide
15 their client with all documents and disclosure created or obtained during representation.
16 Presumably, counsel will discuss with the client the request to withdraw prior to filing the
17 request. Once the motion is filed, counsel will mail a copy of the motion to the client. A
18 copy of the order granting or denying the request to withdraw also will be provided to the
19 client. Further, attorneys are prohibited from failing to act, or acting contrary to the
20 client's interest, thus damaging the client's case.
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23 The proposed addition to Rule 39, section (C)(3), violates ER 1.16, Rule of
24 Professional Conduct. As previously discussed, an attorney is ethically obligated to move
25 to withdraw in certain situations. Proposed addition (C)(3)'s prohibition against
26 withdrawing after a matter has been set for trial places an attorney in an unethical position.
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1 Attorneys do not take lightly their obligations to their clients and only request to withdraw
2 when necessary.

3 The proposed addition to Rule 39 (C)(2)(i), requiring counsel to avow that “the
4 client has been notified in writing of the status of the case including dates and times of any
5 court hearings or trial settings, pending compliance with any existing court orders, and the
6 possibility of sanctions is not necessary in dependency matter” is unnecessary. Parties in a
7 dependency are required to appear in court alongside their attorneys. Clients’ appearances
8 are waived only under extraordinary circumstances. Forms 1, 2 and 3, provided to the
9 parents by the court, require parents to be present for all court hearings and participate in
10 services. Further the forms warn parents that if they fail to attend the court proceedings,
11 they may proceed without them and their legal rights to their children could be terminated.

12 Proposed addition (C)(3)(i) is not feasible in dependency matters. Almost all
13 parents in dependency cases are indigent. The parents are entitled to court appointed
14 counsel because their constitutional right to parent is being challenged. Every county in
15 Arizona has a process for appointing counsel. When an attorney must withdraw from a
16 case, the appointing authority will assign the parent new counsel. The name of the new
17 counsel will not be known until after the motion to withdraw has been granted. Once
18 appointed, the new attorney will quickly and competently prepare the case for the up-
19 coming trial.

20 The portion of proposed Rule 39 (C)(3)(i) that permits a client to sign a request
21 avowing the client is aware of the court date and will be prepared for trial places the
22 indigent parent at a disadvantage. The right to raise one’s own children is a
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1 constitutionally protected fundamental right. *Santosky v. Kramer*, 455 U.S. 745, 747-
2 48(1982); *Maricopa County Juv. Action No. JS-6520*, 157 Ariz. 238, 241, 756 P.2d
3 335,338 (App 1988). However, most of the parents do not possess the legal knowledge to
4 adequately comply with the Rules of Juvenile Court Procedure, competently challenge the
5 state, and present their case to the court. Parents therefore have the due process right to
6 court appointed counsel. *Daniel Y. v. Ariz. Dept. of Economic Sec.* 206 Ariz. 257, 260, ¶¶
7 14, 15, 77 P.3d 55, 58 (App. 2003). Unless a parent specifically requests to represent
8 themselves, a parent always should be provided counsel. The legal presumption is against
9 waiver of counsel. *Id.* At 261, ¶ 15, 77 P.3d at 59. The stakes are too high at a severance
10 trial, termination of the parent child relationship, to allow the parent to avow that they will
11 be prepared to trial if the their attorney withdraws from representation unless the parent is
12 warned about the risks inherent in self representation. *Id.* At 262, ¶ 23, 77 P.3d at 60.

16 The Petition to Amend Rule 39, Rules of Juvenile Procedure, does not state what
17 impact, if any, this Rule change would have on the Attorney General's and county staffed
18 offices which represent parents. Attorney General's and Indigent Representation Offices
19 have frequently have attorneys who leave the Child Welfare/Dependency divisions.
20 Would the assigned attorney on a case set for trial be required to continue representation
21 even after terminating employment? How would they be compensated? Adopting a Rule
22 from civil and family court, where the attorneys are privately retained creates
23 complications in a system where the attorneys are from government agencies and court
24 appointed.

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As outlined in this comment, the procedure in Family and Civil court regarding withdrawal of privately retained counsel is not feasible in dependency matters where counsel is court appointed, and a fundamental constitutional right is at stake.

/s/ Christina Phillis
Christina Phillis
On behalf of APDA

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